No. 16,468

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK A. LEMON and MARTIN de BRUIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Hawaii.

APPELLANTS' OPENING BRIEF.

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PAUL P. O'BRIEN, CLERK

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Upon Appeal from the District Court of the United States for the District of Hawaii.

APPELLANTS' OPENING BRIEF.

Appellants, defendants in a criminal action, have appealed from the final judgment, decision and sentence of the District Court of the United States for the District of Hawaii.

STATEMENT OF JURISDICTION.

By indictment, appellants were charged in the United States District Court for the District of Hawaii in that they did "devise and intend to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent

pretenses, representations and promises . . . for the purpose of executing the said scheme and artifice, and attempting to do so, did place and cause to be placed in an authorized depository for mail matter a letter from the Honolulu Customers Checkbook addressed to . . .'' in violation of Section 1341, Title 18, United States Code.

Following a trial by jury, verdict, judgment and sentence, appellant prosecuted an appeal to this Court.

The jurisdiction of this Honorable Court to review said final judgment of a United States District Court for the District of Hawaii is sustained and provided for by Sections 1291 and 1294 of Title 28, United States Code.

STATEMENT OF THE CASE.

The indictment in five counts charges that appellants from May 21, 1958 to June 17, 1958 devised and intended to devise a scheme to defraud by false representations certain persons and did use the United States mails for the purpose of executing said scheme. (T-3-9.)

Appellants solicited various businessmen and concerns to enter into agreements whereby appellants would distribute certain coupons to the general public entitling the distributees to certain services which their clients obligated themselves to perform. (T-38, 39, 48, 49, 52, 54, 56, 60, 61, 64, 65, 127, 131, 132.) Distribution of said coupons was by telephonic conversa-

tion, preceded by an offer to the public to participate in a question-answering contest. Upon receipt of a correct answer, said public was informed that he was the recipient of merchandise and services of a certain value. (T-34, 35, 69, 70, 71, 93, 102, 103, 106, 109.) Concurrently, each member of the public so contacted was informed that he would have to pay the postman $4.75 for printing and handling costs. (T-70, 71.) (P's Ex. 5-A and 5-B.) Numerous members of the public were so contacted and some of them received "Honolulu Customers Checkbooks." (T-94, 103, 107, 110.) (P's Exs. 7, 8, 9, 10.) Apparently, there were no positive misrepresentations. (P's Ex. 5-A and 5-B.) There is no dispute that the United States Post Office was utilized to effect transfer of the "checkbooks" and the fee involved.

Pursuant to pleas of Not Guilty by appellants to each count of the charge, trial was had before jury and verdict of guilty returned as to each appellant on every count. (T-9.)

At the close of the Government's case, appellants moved for judgment of acquittal, ruling on which was reserved by the Honorable District Court. (T-126.) After verdict, motions in arrest of judgment, acquittal, and for new trial were made and denied. (T-10, 11, 12.) On January 19, 1959, by an Order of Judgment and Commitment, the Honorable District Court adjudged each appellant guilty on all counts and sentenced each of them to three months imprisonment and $500.00 fine on each count. Sentences of imprisonment on each of five counts were to run currently

with each other and payment of the sum of $500.00 on Count I was to constitute payment of the fine on each of the remaining counts. (T-12, 13, 14, 15, 16.)

SPECIFICATION OF ERRORS RELIED UPON.

1. The trial Court erred in denying the motion for a judgment of acquittal made by appellants at the close of the Government's case and renewed following verdict.

2. The trial Court erred in failing to rule and find the evidence adduced insufficient to support a verdict of guilty.

ARGUMENT.

Both specifications involve the basic question of whether the jury could find the defendants guilty as charged on the evidence adduced. It is submitted that it could not do so.

The indictment alleging violation of Section 1341, Title 18, United States Code, in five counts as to each appellant, particularized as part of the "scheme and artifice to defraud" solicitation of persons to be defrauded by telephone, use of question and answer upon contact as inducement for the "person to be defrauded" to order a Honolulu Customers Checkbook, failure to inform said person that "in order to obtain certain of the merchandise and services 'received' it would be necessary to purchase other merchandise, tickets, or services, failure to mention use of telephone

solicitation in dealings with merchants and businessmen; the making of 'oral representations,' well knowing the representations would be and were false and fraudulent when made." (T-3-9.)

Apparently the government's theory is that a fraudulent scheme was concocted by appellants to defraud the members of the general public contacted out of the \$4.70 or so purporting to represent expenditures incident to the preparation and distribution of the "checkbooks". It is undisputed that the United States mail was used as a medium of distributing the checkbooks and hence if the evidence adduced at the trial fairly shows a scheme to defraud, then the verdict of the jury and the judgment and sentence of the trial Court must be upheld. The sole question remaining is whether such evidence was presented at the trial below.

Although there is an allegation in the indictment that false and fraudulent oral representations were made over the telephone (T-4, 5) there was no evidence that any representations were made, unless the failure to inform the public about the necessity of incurring expenditures as a condition of cashing certain of the coupons in the checkbook can be construed as such. Apparently it is the government's theory that a fraudulent scheme can be reasonably and fairly inferred from failure to inform the public of the conditional nature of some of the coupons, from the use of the question and answer form of inducing the public to purchase checkbooks, from the use of the telephone as a means of contact, and from the failure to

inform their clients that telephones would be used to help effect distribution of the coupons. That the government is proceeding on a scheme to defraud without reliance on any fraudulent representations, reliances or promises is apparent from the proof offered on Count Four of the Indictment, where the only evidence tying in the person to be defrauded, a certain Margaret Sorrell, is the record of the post office department of the mailing of a letter from the Honolulu Customers Checkbook to the said Margaret Sorrell. (T-116, 117, 118.) When counsel for appellants stated that the gravamen of the offense would be "the purported prior dealings between the Defendants and the party named in the count", counsel for the government stated that "I think counsel misconstrues the indictment, your Honor". (T-117.)

The first group of witnesses called by the government, consisting of businessmen desiring to advertise their services, gave testimony relative to the medium to be utilized by appellants in contacting the general public. Only a few of them had something to say about that subject though with some there might have been indicated some vaguely felt antipathy toward use of the telephones. Mr. George Oka stated that they (the appellants) "were supposed to go out and sell them either house to house or . . ." (T-32.) The contract between Mr. Oka and appellants provided that "Honolulu Customers Checkbook agrees to pay all of the advertising costs on radio, T.V. and newspapers, and the advertiser pays no costs . . ." (D's Ex. A, T-38, 39.) Defendants' Exhibit "A" was the standard

form utilized by appellants. Mr. Raymond Muramoto testified that promotion was supposed to be by radio, television and the newspapers and that nothing was said about telephone and house to house selling. (T-47.) Grace Stubebaker testified that ". . . it would be general advertising, T.V. and so forth, in a very general manner". (T-50.) Mr. Al Karasick testified that everything was according to the contract. (T-55, 56.) Satoshi Furuya testified "that they will sell it for . . . by house to house campaign". (T-59.) Thomas Higa testified that he didn't know whether anything was said about telephone solicitation. (T-63.) One government witness, Betty Mitchell, testified that appellants indicated to her that a "telephone crew" would be employed. (T-144.) Mr. Antone Youn testified that he was not interested in the manner the books were distributed. (T-128.) Mr. Larry Vincente was not asked that particular question, either by appellants or by the government. (T-130, 131.) Mr. Lyle G. Sprinkle testified that he didn't inquire and "figured that was their end of the promotion". (T-133.)

Whatever might be said as to whether adequate proof has been adduced that representations were made with subscribing merchants that every media would be utilized except by telephone, clearly the state of evidence is unsatisfactory as indicating part of the appellants' scheme to defraud. Assuming that such representations tended to prove a scheme to defraud checkbook purchasers, a fair summary of the evidence adduced on that point is that one or two were

fairly sure that other media were to be utilized while one was sure that a "telephone crew" would be employed. The greater number either did not remember or did not deem the matter of any importance. It would seem that insofar as this point is concerned, the government is making "much ado about nothing".

The other points contended for by the government as showing a scheme to defraud involved use of the telephone to contact purchasers, use of the question and answer technique at the inception of contact, and failure to inform potential purchasers that some of the coupons required some expenditures.

Why use of the telephone instead of other media of contact would tend to show a fraudulent scheme is difficult to conceive. The best that can be said for it is that by such method the potential purchasers would have no prior information as to the conditions attached to some of the coupons. The short answer to that is that such condition would hold true only for a short period of time. It would hardly be reasonable that the appellants intended to contact only the five purchasers named in the indictment. In fact the evidence is that 1,874 C.O.D. letters were seized by the United States Marshal. (T-84.) This being so, assuming that the appellants were men of ordinary perception, it is reasonable to assume that what did later happen insofar as publicity given in the newspapers and Better Business Bureau releases was within their contemplation at the inception of their program. (T-42, 43.) Further, there was evidence that the Honolulu Checkbook scheme was intended to be continued

for a considerable period as indicated by the number of coupons that advertisers agreed to honor. (T-39, 48, 51, 60, 65, 128, 131, 132.) The lowest number agreed to be honored was 5,000 and the highest was 60,000. Such evidence fairly shows that appellants, as men of ordinary perception, must have contemplated extensive publicity to be given their project eventually.

So far as the question and answer technique utilized by appellants the evidence fairly shows that it was calculated to eliminate few, if any, contestants. Clearly it was not intended to reward highly informed persons. If appellants are deemed to be legitimate salesmen, such technique would neither be considered novel nor illegal in the selling profession. However, if it is apparent that the technique used was a transparent blind, then it could not have deceived any except the most gullible. The evidence fails to disclose that anyone contacted by appellants were lacking in an appreciation of the rudimentary facts of life. Apparently the government's theory is that such technique was the sheerest sham and was part of appellants' scheme to deceive. This, in turn, requires a belief by appellants that the general public, at least in Honolulu, was composed of gullible souls. The government's theory requires not only that Honolulu be made up of fools but that the appellants were unaware that their ruse was likely to be detected.

After answers to questions were correctly given, information was offered to prospective purchasers to the effect that they were entitled to certain enumer-

ated free services and merchandise and some others. In addition, they were informed that the services and merchandise had a certain value and that the "check-book" would cost them $4.75 or so. (T-70.) Apparently there were no positive misrepresentations made. However, the purchasers were not informed that certain services or merchandise were required to be purchased before some of the coupons could be utilized. Other coupons, however, were unconditional and required no further expenditures from checkbook purchasers.

Research of counsel has not disclosed one case in point, involving prosecution under Title 18, Sec. 1341, U.S.C., and predecessor statutes. General statements abound as to the meaning to be given language contained in said section. It has been stated, for example, that there need be no proof of common law deceit. 41 A.J. 781, Post Office, Sec. 124. However, whatever may not be required, it is certain that an intent to defraud, or what amounts thereto, must be satisfactorily shown. 41 A.J. ibid. And if the evidence is consistent with innocence as well as guilt, a motion for directed verdict should be granted. *Ridenour v. U. S.,* 14 F. 2d 888 (1926); *Gold v. U. S.,* 36 F. 2d 16 (1929); *McClintock v. U. S.,* 60 F. 2d 839 (1932). Further, so far as our research shows, the vast majority of cases under said Sec. 1341 and predecessor statutes involve charges of false representations. This is not to mean that a "fraudulent scheme" may not be inferred merely from a lack thereof but is a strong

factor to be considered in whether there was or was not a scheme to defraud.

To show a scheme to defraud, the government contends that enough can be inferred from failure to disclose the conditions attached to some of the coupons, use of the question and answer device, and having the advertising businessmen understand that some media other than telephones would be used. The first two are admitted but the state of facts is unsatisfactory as to the last. From these facts we are asked to believe that a scheme was formed in the appellants' minds to extort money from the general public. Certainly a trier of fact can suspect that what happened was pursuant to a formed purpose to defraud. But he can just as easily imagine that such was not the case. It is undoubtedly true that appellants intended to profit from their activities. That is no crime. Assuming that profit making was their principal motive, surely as reasonable men, they would have preferred to make it legally than otherwise. If the services and merchandise offered to the public were all unconditional, surely there would have been no cry of fraud, even with the use of the question and answer technique and telephone. And the proof is that some, if not most, of said services and merchandise were offered unconditionally. Would the fact that they were, to some extent, conditional upon other purchases make that much of a difference? Not per se. Such inference must assume that appellants contemplated just such situation as did occur at the inception of their scheme and that it was

their formed purpose not to disclose to the public the conditional nature of some of the coupons. Other inferences are just as compelling, if not more so. The first is that appellants did not give the matter a thought. The second is that if they thought of it, they did not believe it wrong to fail to disclose, particularly if what the public received amounted to the $50.00 or so represented. The "sales-pitch" as delivered to the public takes up two pages of the transcript. (T-69-71.) To reveal all the conditions would take up more time than already necessary and in view of the small amount charged could have been deemed a luxury. Surely no one contends that every sale requires that full disclosure be made of every detail and condition and exaggerations have been permitted. *Faulkner v. U. S.,* 157 F. 840 (1907); *Eastman v. Armstrong-Byrd Music Co.,* 212 F. 662 (1914). It is stated:

> "It has been held that mere 'puffing' or exaggeration of qualities, usefulness, opportunities, or value of an article of commerce, where the purchaser gets the article intended to be purchased and the value of the article is measured by the price paid, do not constitute the false representations, promises, etc., denounced by the statute."
>
> 41 A.J. 783 ibid.

Another fact militating against the government's theory was that appellants' telephone number was made available to the public contacted. The testimony is that some members of the public not only talked to appellants over the phone but came in to see them

and, in at least one instance, refund made. (T-138, 139, 140, 141.) (P's Ex. No. 5.) It is more than strange that such an arrangement should be made part of a scheme to defraud.

It is respectfully submitted that the most the government has done to sustain its contention of a scheme to defraud is a strained inference of such scheme, amounting to hardly more than a suspicion, practically irreconcilable with most of the facts. It has urged significance to activities innocuous in themselves by suggesting that they could have been part of a sinister scheme. It would not have to go far before every activity of every person becomes suspect, a result hardly to be hoped for. The conclusion is irresistible that prosecution here was begun not because the fairly provable facts showed guilt under the said Section 1341 but because what appellants did was unpopular with the newspapers, the Better Business Bureau and the public. Under the facts not only was innocence as consistent as guilt but innocence was the only logical inference and the Court erred in not granting judgment of acquittal at the close of the government's case, judgment of acquittal after verdict, and in not granting appellants' motion for new trial.

CONCLUSION.

Appellants therefore respectfully submit that the judgment against them should be reversed.

Dated, Honolulu, Hawaii,
October 15, 1959.

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Greenstein & Franklin,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

Chapter 61—Mail Fraud, Title 18, United States Code

Section 1341. Frauds and swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, Sec. 34, 63 Stat. 94.